86 1592 (1)

Supreme Court, U.S.
FILED
MAY 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO: ____________

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RICHARD M. MADDOX PETITIONER

VS.

STATE OF ALABAMA RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

DAVID CROMWELL JOHNSON
300 21st Street North
Suite 900
Birmingham, AL 35203
205-328-1414

51 pp

QUESTIONS PRESENTED FOR REVIEW

I. UNDER SOLEM V. HELM, 463 U.S. 277 (1983), MAY AN APPELLATE COURT REVIEW A SENTENCE FOR PROPORTIONALITY?

II. UNDER SOLEM V. HELM IS PETITIONER'S SENTENCE OF 15 YEARS DISPROPORTIONATE TO THE CRIME FOR WHICH HE WAS CONVICTED?

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

	PAGE
Solem v. Helm, 463 U.S. 277 (1983)	11.13.14. 15.16.17. 19 & 22
Rummel v. Estelle, 445 U.S. 263 (1980)	17
McLester v. State, 460 So.2d 870 (Ala. Crim. App. 1984)	18

OPINIONS BELOW

(All opinions are unpublished and are included in the Appendix.)

The trial court's judgment was affirmed by the Court of Criminal Appeals of Alabama on June 11, 1985, and the order without opinion denying the application for rehearing was delivered on July 23, 1985.

The Supreme Court of Alabama granted certiorari and on April 25, 1986, handed down its decision affirming the conviction and remanding the sentencing issue for reconsideration. The order without opinion denying the application for rehearing were delivered on June 13, 1986.

Pursuant to the direction of the Supreme Court of Alabama, the Court of Criminal Appeals reconsidered the sen-

tencing issue and on September 9, 1986, affirmed the trial court's sentencing judgment. The order without opinion denying the application for rehearing was delivered on October 14, 1986.

On January 30, 1987, the Supreme Court of Alabama denied the petition for writ of certiorari to the Court of Criminal Appeals of Alabama.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

§ 20-2-80(1), Code of Alabama (1980)

Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:

a. Is in excess of one kilo or 2.2 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprionment of three calendar years and to pay a fine of $25,000.00.

§ 20-2-70, Code of Alabama (1980)

(a) Except as authorized by this chapter, any person who possesses, sells, furnishes, gives away, obtains or attempts to obtain by fraud, deceit, misrepresentation or subterfuge or by the forgery or alteration of a prescription or written order or by the concealment of material fact or by use of a false name or giving a false address controlled substances enumerated in schedules I, II, III, IV and V is guilty of a felony, and upon conviction, for the first offense may be imprisoned for not less than two nor more than 15 years and, in addition, may be fined not more than $25,000.00.

STATEMENT OF JURISDICTION

On January 30, 1987, the Alabama Supreme Court denied Petitioner's Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama.

This Court has jurisdiction under Title 28, § 1257(3).

STATEMENT OF THE CASE

This is a drug offense case. On June 10, 1982, Petitioner and Vickie Callahan and Gary Gillum were arrested at their farm home. Petitioner and Gillum were indicted for trafficking in cannabis, and Callahan was indicted for possession of cannabis. Ultimately, Petitioner was tried in the Circuit Court of Coosa County, Alabama and convicted as charged. He was sentenced to 15 years, the maximum punishment under § 20-2-80(1), Code of Ala. (1980). Gillum and Callahan plead guilty and were sentenced to 4 and 3 years respectively.

With regard to this offense, Petitioner and Gillum were on equal footing except for the fact that Petitioner exercised his constitutional right to trial. There were no factual

distinctions between he and Gillum. They were both charged with trafficking and were shown to be equally culpable. When the search warrant was executed, they were both in the greenhouse where the marijuana was being grown. Marijuana was also found in all rooms of the house they shared.

In 1975, Petitioner and Gillum were arrested for growing marijuana on a Shelby County, Alabama farm under facts similar to those present in this case. Petitioner pled guilty to possession and Gillum was his co-conspirator.

ARGUMENT FOR GRANTING THE WRIT

The basis for this petition is Supreme Court Rule 17.1(c).

The Supreme Court of Alabama held in this case that an appellant court may review a sentence pursuant to the Eighth Amendment, even if the sentence is within the prescribed statutory limits set by the legislature. In so holding the court stated that the sentence should be proportionate to the crime.

> In making a proportionality determination, a court should be guided by objective criteria, including:
>
> (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. Solem v. Helm, 463 U.S. at 290-91.
>
> Maddox received the maximum sentence allowed by law for his first felony conviction, while Gillum and Callahan received a four-year sentence and a three-year sentence, respectively. The potential excessiveness of Maddox's sentence requires a review pursuant to the Eighth Amendment.

> Because the Court of Criminal Appeals did not address this issue, we must remand this cause to that court with direction to consider this case in light of Solem v. Helm, supra.

Ex Parte Maddox, [MS 4/25/86] __So.2d__ (Ala. 1986).

Petitioner argued that the cause should be remanded to the trial court, in light of this holding, for a hearing on the objective criteria of Solem v. Helm to produce further evidence that his sentence is disproportionate. Petitioner was sentenced and appealed his conviction before Gillum was sentenced, and had no opportunity to produce all the evidence.

Instead, the Alabama Court of Criminal Appeals held that Solem v. Helm was limited in application to its facts, to wit, the defendant is sentenced to life imprisonment without possibility of

parole for a nonviolent crime; therefore, that case is inapplicable to this case. It further held that an appellate court could only review a sentence for constitutionality, and concluded that "Maddox's sentence is constitutionally permissible; it is not disproportionate in the traditional sense to the crime of trafficking." <u>Maddox v. State</u>, [MS 9/9/86] ___So.2d___ (Ala. 1986).

I. UNDER SOLEM V. HELM AN APPELLATE COURT MAY REVIEW A SENTENCE FOR PROPORTIONALITY

The Court of Criminal Appeals has not correctly interpreted and applied Solem v. Helm, 463 U.S. 277 (1983).

The clear implication and holding of Solem v. Helm, 463 U.S. 277 (1983), is that an appellate court can review a felony sentence of imprisonment for a particular offense to determine whether the punishment suits the crime for which defendant is convicted.

This Court recognized that deference must be given to the trial court and the legislature, but expressly found that their authority did not proscribe review by the appellate courts under the Eighth Amendment.

> Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discre-

> tion that trial courts possess in sentencing convicted criminals. But no penalty is per se constitutional.

Solem v. Helm, 463 U.S. at 290.

The courts are competent to judge the gravity of an offense on a relative scale. There are "generally accepted criteria" by which offenses can be compared. The Supreme Court listed some of these criteria.

> 1. The degree of harm caused the victim or society.
> 2. The culpability of the offender, including his motives and intents.
> 3. The degree of violence inherent in the offense.
> 4. Whether the offense was completed or only attempted.
> 5. Whether the offender was a principal or an accessory after the fact.

Solem v. Helm, 463 U.S. at 292-93.

It was held that courts are generally competent and able to compare different sentences.

> Application of the factors that we identify also assumes that courts are able to compare different sen-

> tences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree. For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

Solem v. Helm, 463 U.S. at 294.

Hence, the objective factors listed by this Court to consider when reviewing a sentence for proportionality under the Eighth Amendment are capable of consideration by the appellate courts.

II. UNDER SOLEM V. HELM, PETITIONER'S SENTENCE OF 15 YEARS IMPRISONMENT IS DISPROPORTIONATE TO THE CRIME FOR WHICH HE WAS CONVICTED.

Petitioner does not challenge the legislatively set limit of 15 years imprisonment for trafficking, nor does he seek a decision striking down the statutes under which he was sentenced. He claims only that his sentence of 15 years for this offense is disproportionate and a violation of the Eighth Amendment.

Upon conviction, the trial court was required under § 20-2-80(1), Code of Ala., to sentence Petitioner to a mandatory minimum sentence of 3 years. It had discretion to impose a longer term, up to 15 years, which it exercised.

In Solem v. Helm, the length of the sentence actually imposed was within the trial court's discretion. The South

Dakota court imposed the maximum allowable sentence. _Helm_ did not challenge the statute, but contended only that _his_ sentence for a noncapital felony was disproportionate to the crime. This is the same situation now presented to the Court by Petitioner.

The Court of Criminal Appeals held that review of Petitioner's sentence was under _Rummel v. Estelle_, 445 U.S. 263 (1980), and that _Solem v. Helm_ was inapplicable because Petitioner did not receive a life sentence without hope of parole. However, the sentence imposed in _Rummel_ was mandated by legislative act, which was not attacked by that defendant. The basis of the _Rummel_ decision was that a mandatory sentence is presumed valid because the legislature presumably considered propor-

tionality objectives and the purpose of incarceration at the time it defined the offense and set the penalties. Therefore, there would be no need for the courts to continue to review mandatory sentences for proportionality, but they would only need to be reviewed for constitutionality. _McLester v. State_, 460 So.2d 870 (Ala. Crim. App. 1984).

However, when the legislature imposes a range of punishment for the offense and leaves it to the trial court's discretion to sentence within that range according to the degree of culpabiltiy, prior record, decree of violence and other considerations, the same presumption cannot always be made. In this situation, deference should still be granted to the legislatively set limits

and the discretion of the trial court, but there has been no review to determine whether the sentence is proportionate to the offense under the particular circumstances before the court.

It was to this issue that the Alabama Supreme Court addressed itself when it remanded the sentencing issue for reconsideration of what it termed the "potential excessiveness of Maddox's sentence." Ex Parte Maddox, [MS 4/25/86] __So.2d___ (Ala. 1986).

Solem v. Helm is the applicable case under which Petitioner seeks review of his sentence. According deference to the legislature and the trial court, Petitioner argues that his sentence is disproportionate to the crime for which he is convicted, especially when com-

pared to the four year sentence of co-defendant Gillum. Petitioner and Gillum were arrested under the same circumstances for the same offense. They were equally culpable for trafficking. Their prior records are similar, including a prior drug offense arising from a similar farming operation in 1975. Yet, Gillum, who pled guilty, received a sentence of four years, and Petitioner, who elected to exercise his right to a jury trial, was sentenced to 15 years imprisonment, the maximum allowable under the Alabama statutes.

Petitioner asked the Court of Criminal Appeals to remand the sentencing issue to the trial court to allow him opportunity to have a hearing and to produce further evidence since Gillum was sentenced after him and his

appeal had been filed. At the time of sentencing, Petitioner could not have known that his sentence was going to be so excessive for the same offense; no record could have established these facts at that time.

CONCLUSION

Petitioner was sentenced to 15 years, the maximum punishment under Alabama law for the offense of which he was convicted. This sentence is disproportionate to the crime in view of his co-defendant's sentence.

Petitioner sought review of his sentence at all levels of his appeal. The Alabama Court of Criminal Appeals has erroneously refused to review the sentence under the standard set in Solem v. Helm. Instead, it reviewed the sentence only for constitutionality. Petitioner has not argued that a sentence of 15 years for trafficking marijuana is unconstitutional. He argues that his sentence is disproportionate, and the limits set by the legislature, which are presumed to be valid, do not

save him from receiving a sentence disproportionate to this particular offense.

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioner respectfully requests this Honorable Court to grant the writ of certiorari to the Alabama Supreme Court and take the issues under consideration.

DAVID CROMWELL JOHNSON
300 North 21st Street
Suite 900, Title Building
Birmingham, Alabama 35203
205-328-1414

CERTIFICATE OF SERVICE

I do certify that I have mailed a copy of the foregoing on all counsel of record by placing same in the United States mail, first class postage prepaid, on this the 31st day of March, 1987.

DAVID CROMWELL JOHNSON

Don Siegelman
Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

James B. Prude
Assistant Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Jossph G.L. Marston, III
Assistant Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1986-87

Ex parte: Richard M. Maddox

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Richard M. Maddox

86-151 v.

State of Alabama)

ADAMS, JUSTICE

The petition for writ of certiorari is denied.

In denying the petition for writ of certiorari, this Court does not wish to be understood as approving all the language, reasons, or statements of law in the Court of Criminal Appeals' opinion. Horsley v. Horsley, 291 Ala. 272, 280 So.2d 155 (1973).

WRIT DENIED.

Tobert, C.J., Maddox, Jones, Shores, Beatty, Houston, and Steagall, JJ., concur.

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1985-86

5 Div. 761

RICHARD MADDOX

v.

STATE

Appeal from Coosa Circuit Court

On Remand

Decided September 9, 1986
Rehearing denied October 14, 1986

PATTERSON, JUDGE

On Remand from our supreme court, we are ordered to consider the following issue in light of Solem v. Helm, 463 U.S. 277 (1983): Whether the trial court abused its discretion in sentencing Maddox to fifteen years' imprisonment while sentencing Callahan and Gillum to three and four years' imprisonment,[1] respectively.

In Solem, the Supreme Court declared unconstitutional an enhanced sentence of life imprisonment without possibility of parole imposed on a defendant who pleaded guilty to passing a bad $100 check after having been convicted for six nonviolent felonies. The Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Id. at 290. The Court, as guidance in reviewing the proportionality of sentences under the Eighth Amendment, set forth the following "objective factors" to be considered: (i) an assessment of the gravity of the offense and the harshness of the penalty; (ii) a comparison of the punishment with the sentences imposed on other convicted defendants in the same

jurisdiction; and (iii) a comparison of the punishment with the sentences imposed for the commission of the same crime in other jurisdictions. Id. at 290-92. The Court considers this "abstract evaluation of the appropriateness of a sentence for a particular crime" to be review of proportionality in the traditional sense. Pulley v. Harris, 465 U.S. 37, 42-43 (1984). Such review determines whether "punishments [are] inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime." Id. at 43.

We use this opportunity to, once again, apply the principles expounded in Rummel v. Estelle, 445 U.S. 263 (1980), rather than the extended analysis of traditional proportionality, as set

forth in *Solem*. *See*, *e.g.*, *McGee v. State*, 467 So. 2d 685, 690-91 (Ala. Cr. App. 1985); *McLester v. State*, 460 So. 2d 870 (Ala. Cr. App. 1984). *See also Hester v. State*, 473 So. 2d 1054, 1055 (Ala. 1985) (Jones, dissenting); *Harbor v. State*, 465 So. 2d 460 (Ala. 1985). The petitioner in *Rummel* had been sentenced to life imprisonment (with possibility of parole) under the Texas recidivist statute for his third conviction, which was for obtaining $120.75 by false pretenses. His two prior convictions were for nonviolent offenses. The *Rummel* Court, in holding that the petitioner's sentence was not violative of the Eight Amendment, recognized that the severity of punishment to be accorded different crimes was a matter of legislative policy. *Id*. at 282-83.

This deference to legislative prerogative was reinforced in Hutto v. Davis, 454 U.S. 370 (1982), wherein the Court reversed the Fourth Circuit's finding that a forty-year sentence for the possession of nine ounces of marijuana violated the Eighth Amendment. In so holding, the Court held that the Rummel Court had disapproved each of the "objective factors" on which the lower court relied, id. at 373, and reiterated its mandate from Rummel, as follows:

> "In short, Rummel stands for the proposition that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment,' id. at 274, and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare,' id at 272. By affirming the District Court decision after our decision in Rummel, the Court of Appeals sanctioned an intrusion into the basic linedrawing process that is 'properly within the province of legislatures, not courts.' Id., at 275-276."

Id. at 374 (footnote omitted).

Even the Court in Solem reemphasized that the scope of appellate review of a sentence authorized by the legislature is greatly restricted, for it gave the following warning:

> "Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."

463 U.S. at 290 (footnote omitted). And further:

> "[W]e do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate."

Id. at 290, n. 16. See also Harbor v. State, 465 So. 2d 460, 460 (Ala. 1985) (wherein the court, in a five-to-four decision, in refusing to address the issue of whether the petitioner's punishment of fifteen years was disproportionate to the crime of possession of a controlled substance, noted, "We cannot agree with the petitioner's argument that the Supreme Court of the United States in Solem v. Helm, 463 U.S. 277 ... (1983), required appellate courts to test all sentences against the proscriptions of the cruel and unusual punishment clause of the Eighth Amendment to the Constitution").

We find that the principles of Rummel control those cases with fact situations not clearly distinguishable from those in Rummel. See Moreno v. Estelle, 717

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

F.2d 171, 180 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984). As clarified by the Solem majority, the Court's application of the traditional proportionality analysis to a sentence of life imprisonment without possibility of parole for the conviction of a non-violent felony did not overrule Rummel v. Estelle:

> "Contrary to the suggestion in the dissent, post, at 385-312, our conclusion today is not inconsistent with Rummel v. Estelle. The Rummel Court recognized...that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment. 455 U.S., at 274, n. 11. Indeed, Hutto v. Davis, 454 U.S., at 374, and n. 3, makes clear that Rummel should not be read to foreclose proportionality review of sentences of imprisonment. Rummel did reject a proportionality challenge to a particular sentence. But since the Rummel Court - like the dissent today - offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation. Here the facts are clearly distinguishable. Whereas Rummel was eligible for a reasonably early parole, Helm, at age 36, was

> sentenced to life with no possibility of parole. See supra, at 297, and 300-303."

463 U.S. at 303-04, n. 32 (emphasis added.)

In McLester v. State, 460 So.2d. 870, 873-75 and n. 2 (Ala.Cr.App. 1984), the court in accordance with a joint reading of Rummel and Solem, construed Solem's application of traditional proportionality to be narrowly confined to the circumstances where the defendant was sentenced to life imprisonment without possibility of parole for the conviction of a nonviolent crime. The court further noted that, under our penal code, the combination of these two circumstances is "virtually inconceivable." Id. at n. 3.

In reasserting this construction, we adopt the following:

> "[T]o the extent that Solem does not overrule the reasoning of Rummel and Davis but, rather, explicitly accepts the position asserted in those cases, that in noncapital cases successful proportionality challenges will be extremely rare, 463 U.S. a 289-90,... it seems to us that Solem requires an extensive proportionality analysis only in those cases involving life sentences without parole. We are inclined to interpret Solem in this light, especially given the Solem Court's refusal to overrule Rummel and Davis, and accordingly uphold the terms of years' sentences herein as appropriate sentences within the limits set by Congress."

United States v. Rhodes, 779 F.2d 1019, 1027-28 (4th Cir. 1985), cert. denied, ______ U.S. _______, 106 S.Ct. 2916 (1986).

Thus, we find ourselves confronted with a sentence which is outside the narrow confines of Solem and within the scope of Rummel. Accordingly, in reviewing Maddox's sentence, we initially grant "substantial deference" to the authority of the legislature and to

the discretion of the trial court. Solem, 463 U.S. at 290. Then, rather than engaging in the extended analysis of Solem, we need decide only whether Maddox's sentence is within constitutional limits.[2] Id. at 290, n. 16. Giving the required deference to the legislature and to the sentencing Court, we find that Maddox's sentence is constitutionally permissible; it is not disproportionate in the traditional sense to the crime of trafficking. "A life sentence has been held not to constitute cruel or unusual punishment for drug trafficking offenses." Robinson v. State, 474 So.2d 685, 686 (Ala. 1985) (citing Dickerson v. State, 414 So.2d 998, 1005 (Ala. Cr. App. 1982), and cases cited therein). Here, Maddox received only fifteen years.

Moreover, variation in sentence between co-actors in a criminal transaction alone doe not make the harsher sentence cruel and unusual. United States v. Garcia, 785 F.2d 214, 227-28 (8th Cir.) cert. denied, _____ U.S. _____, 106 S.Ct. 1797 (1986); United States v. Collins, 690 F.2d 670, 674 (8th Cir. 1982); Gregory v. United States, 585 F.2d 548, 550 (1st Cir. 1978). See also United States v. Bonnet, 769 F.2d 68, 71 (2d Cir. 1985).

> "Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentence."

Williams v. Illinois, 399 U.S. 235, 243 (1970) (quoted in Gregory v. United States, 585 F.2d at 550.

The Alabama legislature's intent for the sentencing court to have very broad discretion in specifically sentencing the trafficker according to the circumstances involved in each case is manifested by the fact that the legislature fashioned the penalty provision of the trafficking statute to have the undesignated maximum penalty of life imprisonment. Considering this implicit intention to curb the drug traffic, the large amount of drugs found on the premises, the extent of the operation of . cultivating the marijuana, and Maddox's known reputation of dealing in drugs, we hold that the trial court did not subject Maddox to punishment outside constitutional limitations.

As a final note, we observe that, in the event we were to apply the Solem

analysis, we would consider the particular sentences received by Gillum and Callahan to be irrelevant. McLester v. State, 460 So.2d at 876. Analysis of a particular sentence by traditional proprotionality principles entails an "abstract evaluation." Pulley v. Harris, 465 U.S. at 42. In addition to holding that Maddox's sentence is not violative of the Eighth Amendment, we find that Maddox has failed to show that his sentence "was obviously in punishment for Maddox's insistence upon a jury trial." The evidence establishes that Gillum[3] entered into a plea bargain agreement and changed his plea of not guilty to guilty over nine months after Maddox's sentencing. Upon sentencing approximately seven moths later, Gillum received a substantially lesser sentence than Maddox.

These facts do not establish that Maddox's sentence was in retaliation of his exercise of his right to a trial by jury. Rather, it is apparent from the sequence of events that Gillum, after realizing the severity of Maddox's sentence, decided to reap the benefits of a plea bargain agreement. Moreover, it is the sentencing court's prerogative to accept such an agreement. We agree with the following observations made in Hitchcock v. Wainwright, 770 F.2d 1514, 1518-19 (11th Cir. 1985), cert. granted in part, _____ U.S. ____, 106 S.Ct. 2888 (1986):

> "In the 'give-and-take' of plea bargaining, the state may extend leniency to a defendant who pleads guilty foregoing his right to jury trial. Brady v. United States, 397 U.S. 742, 753...(1970). Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate

> guilty pleas. ...A judge, as much as the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. *Cf. Corbitt*, 439 U.S. [212,] 224 n. 14 ...(cannot permit prosecutor to offer leniency but not legislature).
>
> "....
>
> "Moreover, by pleading guilty a defendant confers a substantial benefit to the objectives of the criminal justice system:
>
> > "the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.
>
> "*Brady v. United States*, 397 U.S. at 752... . The State is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753... . The heart of a plea bargain, from a defendant's point of view, is the option of avoiding a possibly harsher sentence after conviction at trial."

In conclusion, we note that since an effect cannot precede its cause,

Maddox's sentence could not have been based on vindictiveness.

Accordingly, we once again affirm the judgment of the circuit court.

AFFIRMED.

THE STATE OF ALABAMA -- JUDICIAL
DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1985-86

Ex parte Richard M. Maddox,
Vickie Ellen Callahan, and
Gary Dean Gillum

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Richard M. Maddox,
Vickie Ellen Callahan, and
Gary Dean Gillum

84-1159 v.

State)

Decided April 25, 1986
Rehearing denied June 13, 1986

BEATTY, JUSTICE.

The Court granted certiorari in this case in order to determine whether the evidence seized pursuant to a search of a farm where Richard Maddox, Vickie Callahan,and Gary Gillum resided should

be suppressed because law enforcement officials allegedly violated their Fourth Amendment rights, and to determine whether Maddox's subsequent sentence violated his Eighth Amendment rights. We affirm in part, and remand with directions.

On December 2, 1982, Maddox was found guilty of trafficking in cannabis by a Coosa County jury and sentenced to a term of 15 years in the penitentiary. On November 18, 1983, Callahan pleaded guilty to felony possession of marijuana and was sentenced to three years' imprisonment. On the same day, Gillum pleaded guilty to trafficking in cannabis and was sentenced to four years' imprisonment. In a supplemental

plea agreement, the State, with apparent concurrence of the trial court, agreed that Callahan and Gillum retained the right to appeal the legality of the search which led to the obtaining of evidence against the petitioners. The appeals of the three petitioners were consolidated by the Court of Criminal Appeals.

On June 9, 1982, Officer David Windsor, an investigator with the Coosa County Sheriff's Department, received information that marijuana was being grown on premises subsequently determined to be occupied by Maddox, Callahan, and Gillum. Based upon this information, Officer Windsor and Coosa County Deputy Sheriff Terry Browning proceeded to the property.

Officers Windsor and Browning approached the property from a dirt road south of the property and observed what Officer Windsor described as "normal farmhouse scene." Officer Windsor testified that he observed a dwelling house, shed, garage, and chicken house, all grouped in the same general area. The chicken house was located 15 to 20 feet from the dwelling. Attached to the east side of the chicken house was a greenhouse-type structure "covered with corrugated fiberglass." The two officers observed this scene from a wooded area south of the buildings and beyond an "old fence" which encircled the property. Officer Windsor testified that the fence was approximately 200 to 300 feet south of the buildings;

however, J. M. Keel, a land surveyor, testified that the fence was 400 to 425 feet from the greenhouse.

After observing the general area, Officers Windsor and Browning then walked along the "edge of the woods" in a westerly direction to a position due south of the greenhouse. In order to get a better view, Officer Windsor then crossed the fence and concealed himself in some bushes along the edge of a pond which was on the property. With the aid of binoculars, Officer Windsor observed a "couple of small plants," which he recognized as marijuana, growing outside the greenhouse doors.

Officer Windsor then moved closer and hid behind a pickup truck parked in front of the greenhouse. He observed

two more marijuana plants growing outside the greenhouse. The greenhouse had two large doors, which were open; however, a plastic partition with large slits hung at the opening. Officer Windsor could see into the greenhouse and observed more marijuana plants. The two officers then left and obtained a search warrant based on Officer Windsor's observations.

On June 10, 1982, Officer Windsor and five other law enforcement personnel returned to the property to execute the search warrant. The warrant was directed to Gillum as owner of the property. His ownership was indicated by the county tax assessor's records. Maddox, Callahan, and Gillum were found

in the greenhouse.

During a search of the dwelling house, marijuana was found in several rooms, including the three bedrooms. The appellants accompanied the officers during the search, and Officer Windsor testified that Maddox identified one of the bedrooms as being his. The two other bedrooms were identified as belonging to Callahan and Gillum. Maddox also claimed ownership of some "cash money" which was found in the room identified as his.

The petitioners contend that Officer Windsor's intrusion into the curtilage of their residence was a violation of their Fourth Amendment rights, and, therefore, that the search

should be suppressed.

The Court of Criminal Appeals determined that Officer Windsor intruded upon the curtilage of the residence of the petitioners without a warrant in violation of the Fourth Amendment protection against unreasonable searches. However, that court held that the search warrant itself was not invalidated by the fact that the information was illegally obtained, , because the tainted information was not included in the warrant affidavit.

The Fourth Amendment to the United States Constitution and Article I, § 5, of the Alabama Constitution protect people from unreasonable searches and seizures of their persons, houses,

papers, and possessions. This protection applies to the area immediately surrounding one's home, often referred to as the curtilage. Oliver v. United States, 466 U.S. 170 (1984); Whistenant v. State, 50 Ala. App. 182, 278 So. 2d 183, cert. denied, 291 Ala. 802, 278 So. 2d 198, cert. denied, 414 U.S. 1066 (1973).

Officer Windsor could legitimately search the open fields surrounding the petitioners' property without violating any Fourth Amendment rights. Moylan, The Plain View Doctrine, 26 Mercer L. Rev. 1047, 1097 (1975); Skipper v. State, 387 So. 2d 261 (Ala. Crim. App.), cert. denied, 387 So. 2d 268 (Ala. 1980). When Officer Windsor positioned

himself near the pond and spotted two marijuana plants growing outside the greenhouse, he was not violating Fourth Amendment rights, as he was not within the curtilage.

The Fourth Amendment protection applies to buildings within the curtilage. Whistenant v. State, supra. The evidence adduced at trial established that the greenhouse was within the curtilage. We agree with the Court of Criminal Appeals that when Officer Windsor entered the curtilage without a warrant he was violating the petitioners' Fourth Amendment rights. We must now determine whether this violation invalidated the search

warrant.

The warrant affidavit states in pertinent part:

> "Before me Robert J. Teel, Jr., a district court judge, personally appeared David E. Windsor, a law enforcement officer, who being duly sworn deposes and says that on this the 9th day of June, 1982, he has personally see in plain view and within the last twenty-four hours and has probable cause to believe and does believe that there is now being cultivated marijuana plants ... upon the premises of, to-wit: Gary Dean Gillum...."

"The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contains allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit

suffices to show probable cause." United States v. Gardenia, 416 U.S. 505, 555 (1974) (Powell, J., concurring in part and dissenting in part). This rule has been upheld by a number of federal courts of appeals. See, e.g., United States v. Romero, 585 F.2d 391 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979); United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977); United States v. Watts, 176 U.S. App. D.C. 314, 540 F.2d 1093 (D.C. Cir. 1976).

Even given the illegality of Officer Windsor's intrusion into the curtilage, the warrant is valid if the underlying affidavit contains enough information independently obtained to

establish probable cause. See United States v. Adames, 485 F. Supp. 965 (E.D. N.Y. 1980), affirmed, 652 F.2d 55 (2d Cir. 1981).

Applying the above rule to the underlying affidavit in this case, we find that the affidavit contains sufficient information, independent of information related to the search within the curtilage, to enable the magistrate to find probable cause. Officer Windsor testified that he observed, from a position outside the curtilage, two marijuana plants growing outside the greenhouse. This information in itself was sufficient to establish probable cause.

Bearing in mind the limited

standard of proof necessary for a showing of probable cause, we affirm the judgment of the Court of Criminal Appeals insofar as it held that the search warrant was not invalidated by the illegally obtained information and thus that the evidence seized was properly admitted into evidence at trial.

Maddox also contends in this Court, as he did below, that the trial court abused its discretion in sentencing him to fifteen years' imprisonment, while sentencing Callahan and Gillum to three and four years' imprisonment, respectively.

The appellate courts of this state are generally prohibited from reviewing

the propriety of a sentence which is within the statutorily prescribed limits, as is Maddox's sentence. Brown v. State, 392 So. 2d 1248 (Ala. Crim. App. 1980), cert. denied, 392 So. 2d 1266 (Ala. 1981); Code of 1975, § 20-2-80. However, the appellate courts may review a sentence, which, although within the prescribed limitations, is so disproportionate to the offense charged that it constitutes a violation of a defendant's Eighth Amendment rights. Ex parte Harbor, 465 So. 2d 460, 461 (Ala. 1985) (Faulkner, J., dissenting).

The United States Supreme Court in Solem v. Helm, 463 U.S. 277 (1983), recognized that reviewing courts should grant substantial deference to the

authority of legislatures in determining the kinds and limits of punishment for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. Yet, the sentence should be proportionate to the crime. In making a proportionality determination, a court should be guided by objective criteria, including:

> "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. at 290-91.

Maddox received the maximum sentence allowed by law for his first felony conviction, while Gillum and

Callahan received a four-year sentence and a three-year sentence, respectively. The potential excessiveness of Maddox's sentence requires a review pursuant to the Eighth Amendment. Because the Court of Criminal Appeals did not address this issue, we must remand this cause to that court with directions to consider this case in light of Solem v. Helm, supra. It is so ordered.

AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.

Torbert, C.J., Maddox, Jones, Almon, Shores, Adams, and Houston, J.J., concur.

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1984-85

5 Div. 761
5 Div. 919
5 Div. 920

Richard M. Maddox
Vickie Ellen Callahan
Gary Dean Gillum

v.

STATE

Appeals from Coosa Circuit Court

Decided June 12, 1985
Rehearing denied July 23, 1985

PATTERSON, JUDGE

The appellants, Richard M. Maddox, Vickie Ellen Callahan, and Gary Dean Gillum, were arrested on June 10, 1982, and charged with violating the Alabama

Uniform Controlled Substances Act. Ala. Code 1975, § 20-2-1 through 20-2-144. Appellants Maddox and Gillum were specifically charged with trafficking in cannabis, in violation of § 20-2-80, and appellant Callahan was specifically charged with possession of marijuana, in violation of § 20-2-70. Indictments were returned against each appellant, by the June 1982 term of the Coosa County Grand Jury, indicting each with the violation for which they were initially charged.

On December 2, 1982, Maddox was found guilty of trafficking in cannabis by a Coosa County jury. Following an unfavorable pre-sentence report, Maddox was sentenced to a term of fifteen years in the penitentiary. On November 28, 1983, eleven months after Maddox was

found guilty, Callahan pleaded guilty to felony possession of marijuana and was sentenced to three years' imprisonment. On the same day, Gillum pleaded guilty to trafficking in cannabis, and was sentenced to four years' imprisonment. In a supplemental plea agreement, the State, with apparent approval of the trial court, agreed that Callahan and Gillum retained the right to appeal the legality of the search which led to the obtaining of evidence against the appellants.

Subsequent to this agreement, Callahan and Gillum moved to consolidate their appeals with that of Maddox. A similar motion was made by the State. All appellants are represented by the same attorney on appeal. The motions to consolidate were granted by this court

on November 7, 1984.

On his appeal, Maddox questions the legality of the search and seizure of evidence which led to his conviction. At trial his motion to suppress, after a hearing thereon, was overruled by the trial court. In a supplemental brief filed on behalf of Callahan and Gillum, they raise the same issues presented for review by Maddox. Resolution of the issues raised by Maddox will be dispositive of the issues raised by Callahan and Gillum.

On June 9, 1982, Officer David Windsor, an investigator with the Coosa County Sheriff's Department, received information that marijuana was being grown on premises subsequently determined to be occupied by Maddox, Callahan, and Gillum. Based upon this

information, Windsor and Coosa County Deputy Sheriff Terry Browning proceeded to the property. Windsor and Browning approached from a dirt road south of the property and observed what Windsor described as a "normal farmhouse scene."

Windsor testified that he observed a dwelling house, shed, garage, and chicken house, all grouped in the same general area. The chicken house was located 15 to 20 feet from the dwelling. Attached to the east side of the chicken house was a greenhouse-type structure "covered with corrugated fiberglass." Windsor and Browning observed this scene from a wooded area south of the buildings and beyond an "old fence," which encircled the property. This fence was described as "old," but not decayed. Windsor

testified that the fence was approximately 200 to 300 feet south of the buildings. J. M. Keel, a land surveyor, testified that the fence was 400 to 425 feet from the greenhouse.

After observing the general area, the deputies then walked along the "edge of the woods" in a westerly direction, to a position due south of the greenhouse. In order to get a better view, Windsor then crossed the fence and concealed himself in some bushes along the edge of a pond which was on the property. From this position, Windsor studied the scene with the aid of a pair of binoculars. Windsor testified that with the aid of the binoculars he observed "a couple of small plants," which he recognized as marijuana, growing outside the greenhouse doors.

Windsor then moved closer to the greenhouse and hid behind a pickup truck parked in front of the greenhouse. Windsor observed two more marijuana plants growing outside the greenhouse. The greenhouse had two large doors with large slits hung at the opening. Windsor could see into the greenhouse and observed more marijuana plants. The deputies then left and obtained a search warrant based on Windsor's observations.

On June 10, 1982, Windsor and five other law enforcement personnel returned to the property to execute the search warrant. The warrant was directed to Gillum as owner of the property. His ownership was indicated by the county tax assessor's records. Maddox, Callahan, and Gillum were found in the greenhouse. Windsor testified that,

upon being arrested, Maddox stated, "I don't guess that was such a good idea after all." During a search of the residence, marijuana was found in almost every room. The appellants accompanied the officers during the search, and Windsor testified that Maddox identified one of the bedrooms as being his. The two other bedrooms were identified as belonging to Callahan and Gillum. Maddox also claimed ownership of some "cash money" which was in the room identified as his. In reference to the money, Maddox purportedly stated to Windsor. "I have just gotten my check cashed. That doesn't have anything to do with this." Maddox did not take the stand in his own behalf either on the motion to suppress or at trial. He offered no evidence at trial and his

defense consisted of a probing and searching cross-examination of the State's witnesses and arguments to the jury.

On appeal the appellants contend that the search warrant was improperly issued and therefore that no evidence resulting from the search would be admissible against them. Appellants do not question the facial sufficiency of the affidavit nor do they dispute the evidence presented to the magistrate to support a finding of probable cause for the issuance of the search warrant. Rather they contend that all the evidence before the magistrate was obtained by the officer in violation of their Fourth Amendment rights, and, therefore, that it was improper for the magistrate to consider it in making a

PUBLISHER'S NOTE:

The following page is unavailable for filming;

10

doctrines do not operate to allow Officer Windsor's observations to be utilized as probable cause to support the issuance of the search warrant. We agree that the cited doctrines are inapplicable to the facts of this case; however, we view the inapplicability of these doctrines as having no effect on the issuance of the warrant.

Our analysis will first focus on Officer Windsor's initial observations from his position near or at the pond. We will then discuss the ramifications of Officer Windsor's second position closer to the greenhouse. As will be seen, Officer Windsor did not violate any of the appellants' Fourth Amendment rights until he crossed the constitutionally protected threshold of the curtilage in order to obtain a

better view of the plants he had previously identified as marijuana.

A.

When Officer Windsor positioned himself near the pond and spotted the two marijuana plants growing outside the greenhouse, he was not in a factual situation in which the "plain view" doctrine would have been applicable. This doctrine allows government agents to make warrantless seizures under certain well defined circumstances. See Myers v. State, 431 So. 2d 1342 (Ala. Cr. App. 1982), cert. quashed, 431 So. 2d 1346 (Ala. 1983). See also Moylan, The Plain View Doctrine, 26 Mercer L. Rev. 1047 (1975); W. LaFave, Search and Seizure, § 2.2 (1978). We view the facts of the case at bar as a situation more appropriately designated as an

PUBLISHER'S NOTE:

The following page is unavailable for filming;

13

PUBLISHER'S NOTE:

The following page is unavailable for filming;

14

Officer Windsor was trespassing when he observed the two marijuana plants, has "little or no relevance to the applicability of the Fourth Amendment." See also, Whistenant v. State, 50 Ala. App. 182, 278 So. 2d 183, cert. denied, 291 Ala. 802, 278 So. 2d 198, cert. denied, 414 U.S. 1066 (1973). It is clear that Officer Windsor could legitimately search the open fields surrounding the property without violating any Fourth Amendment rights, because "[t]he Fourth Amendment is simply not 'out there' in the open fields." Moylan, The Fourth Amendment Inapplicable, at 92. See also Skipper v. State, 387 So. 2d 261 (Ala. Cr. App.), cert. denied, 387 So. 2d 268 (Ala. 1980).

B.

The testimony of Officer Windsor established that the residence, garage, shed, chicken house, and greenhouse were all in relatively close proximity to each other. Officer Windsor described it as a "normal farmhouse scene" situated on approximately forty acres of land, enclosed by barbed wire fencing. Mr. C. M. Keel testified that he observed the presence of several "no trespassing" signs around the boundary when he surveyed the property. Officer Windsor denied seeing any signs. When Officer Windsor approached the greenhouse, he had to calculate his position in order not to be seen by persons occupying the residence, which was located 15 to 20 feet from the chicken house which had the greenhouse appended to it. This chicken house was

located south of the residence, and another, smaller building was situated on the north side of the residence. The front door of the residence faced east. The pond was located south of the chicken house/greenhouse, and Windsor positioned himself on the east end of the pond. Officer Windsor was therefore observing the front of the residence and chicken house/greenhouse. A truck, which Officer Windsor hid behind when he approached for a closer observation, was parked in front of the chicken house/greenhouse.

In Whistenant v. State, 50 Ala. App. at 194, 278 So. 2d at 194, the court stated:

> "The Fourth Amendment does, however, apply to buildings within the curtilage which may include 'a garage ...; a barn ...; a

> smokehouse ...; a chicken house ...; and similar property. Whether the place to be searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.' Care v. United States (10 Cir.) 231 F.2d 22."

See also Skipper v. State, supra. The evidence adduced at trial clearly established that the chicken house/greenhouse was within the curtilage of the residence. No Fourth Amendment violation occurred until Officer Windsor made this warrantless entry into a constitutionally protected area. As stated by Judge Moylan:

> "When the policeman stands outside the constitutionally protected area and looks inside, his constitutionally legitimate observations simply give him probable cause. Some additional predicate is necessary for him

then to cross the threshold.

> "In the case of fixed premises, all the probable cause in the word will not justify a warrantless entry. Coolidge [v. New Hampshire, 403 U.S. 443 (1971),] was very clear on that point...."

Moylan, The Plain View Doctrine, 26 Mercer L. Rev., at 1098.

II

Having determined that Officer Windsor encroached upon the curtilage without a warrant in violation of the Fourth Amendment protection against unreasonable searches, we must now determine whether this violation invalidated the warrant and, consequently, whether the evidence seized should have been suppressed.

In the case sub judice, the warrant affidavit states in pertinent part:

> "Before me, Robert J. Teel, Jr., a district court judge, personally appeared David E. Windsor, a law enforcement officer, who being duly sworn deposes and says that on this, the 9th day of June, 1982, he has personally seen in plain view and within the last twenty-four hours and has probable cause to believe and does believe that there is now being cultivated marijuana plants ... upon the premises of, to-wit: Gary Dean Gillum...."

This affidavit was typed by Windsor and taken to judge Teel, who issued the search warrant. Windsor swore, under oath, to the truth and correctness of the affidavit and discussed additional facts with the Judge which were not • detailed in the affidavit.

During the suppression hearing, defense counsel extensively cross-examined Windsor about his testimony before Judge Teel. The pertinent part of the record reflecting this cross-examination is as follows:

"Q. ... All right. With the information that you then had you came down, Mr. Windsor, and talked with Judge Teel?

"A. On the 9th.

"Q. On the 9th, and swore to the pertinent aspects for the purpose of getting a search warrant?

"A. Yes, sir.

"Q. And everything that you told him is within the four corners of this warrant here?

"A. No, sir, not everything.

"Q. Well, the pertinent materials are within the four corners of this warrant?

"A. There was other information mentioned.

"Q. What other information did you give him?

"A. That there was a greenhouse and there was marijuana growing in it.

"Q. Is that all?

"A. I don't remember everything that was said but there were other things.

"Q. Whatever you recall, I would

like for you to tell us what you recall.

"A. I told him to the effect that there was a large greenhouse up there on the side of the chicken house and that there was marijuana growing in it.

"Q. All right. Anything else?

"A. Not that I recall.

"Q. All right. So what you told him is those things you have just mentioned -- and of course you said in here that you had seen it?

"A. Yes, sir.

"Q. All right. And what you have told him, that was typed up and that you swore to?

"A. Yes, sir.

"Q. For the purpose of getting a search warrant?

"A. Yes, sir, that's right.

"....

"Q. You came back -- called somebody, I know that, but eventually came back to the courthouse and saw Judge Teel and told him that you had seen plants on the property of Gillum -- whatever Gillum's last name is, is

that right?

"A. Told Judge Teel that?

"Q. Yes, sir.

"A. Yes, sir.

"Q. You didn't tell him you had already been on that man's property, did you?

"A. I told him I had seen the plants.

"Q. All right. But you didn't tell him you had seen them from an opening on the property up next to the property?

"A. I don't know whether I told him that or not.

"....

"Q. Then you typed it up and went out to Judge Teel's house. What time of night, please, sir?

"A. I arrived at his house sometime shortly before twelve midnight that night. After we talked for a while, when he was ready to sign it.

"....

"Q. But, at any rate, you wanted to search a garage, two chicken houses, and any and all

outbuildings of this same residence? That's what you wanted to search, what you told the judge you wanted to search?

"A. Yes, that's what I wanted to search.

"Q. And that was what was these things right here, isn't that true? (Indicating)

"A. Yes, sir."

"Q. Is that what you wanted to search?

"A. Yes, sir.

"Q. And at the time you told the judge that, you had already been up there and seen in the slits, had you not?

"A. Yes, sir.

"Q. And you had seen those plants right there inside the fenced part but before you get to that flapping area? You had seen those plants in there, hadn't you?

"A. Yes, sir.

Our review of the affidavit and testimony leads us to conclude that the search warrant was not invalidated by

the illegally obtained information, for it is clear that the tainted information was not included in the warrant affidavit. There is no specific reference in the affidavit to the observations of marijuana growing in the greenhouse, although this information was communicated to Judge Teel outside the affidavit. The affidavit states that Windsor saw "in plain view" marijuana being cultivated on the property. Obviously Windsor's non-technical use of the term "plain view" is synonymous with the term "open view." The only plants which could be said to be in "open view" were the two initially observed by Windsor from the pond. We believe that the facts alleged in the affidavit refer to the officer's untainted observations of the marijuana

plants growing outside the greenhouse. This is supported by his testimony quoted above, where he, if effect, states that the information given the magistrate concerning the marijuana plants in the greenhouse was not included in the "four corners" of the affidavit. Even if the tainted evidence had been included in the affidavit, it would not have necessarily rendered the resulting warrant invalid. United States v. Giordano, 416 U.S. 505 (1974); United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977). In the recent case of United States v. Karo, ____ U.S. ____, 104 S. Ct. 3296, 3303 (1984), a case involving electronic surveillance, the Court determined that monitoring the beeper in a private residence not open

PUBLISHER'S NOTE:

The following page is unavailable for filming;

27

u

c

p

t

a

r

m

a

i

o

i

s

F

tainted evidence of Windsor's initial servations of the two marijuana ants. This information was sufficient establish probable cause. More than mere suspicion of illegal activity sulted from an observation of two rijuana plants growing outside what peared to be a greenhouse. The formation obtained by Windsor's closer servation was merely cumulative of the formation he had already obtained. As ated in <u>United States v. Epstein</u>, 240 Supp. 80, 83 (S.D.N.Y. 1965):

> "This is not to say that law enforcement officials may with impunity include impermissible matter in applications for search warrants in the hope that a Commissioner might thereby be persuaded to find probable cause where otherwise none exists or the issue is in doubt .... But in a case like the present one, where the challenged matter is merely cumulative, no such danger is run and the warrant may be upheld."

PUBLISHER'S NOTE:

The following page is unavailable for filming;

29

PUBLISHER'S NOTE:

The following page is unavailable for filming;

30

unlawful search and seizure.

IV

As we have pointed out, the sole contention of the State is that Maddox did not have standing to object to the search and seizure. In view of our findings above, we deem it unnecessary to address the questions of standing raised by the State on appeal.

We have considered appellant Maddox's contention that the trial court abused its discretion in sentencing him to fifteen years while sentencing Callahan and Gillum to three and four years, respectively. We find no merit in this contention.

For the reasons stated above, the judgment of the trial court in reference to Maddox is due to be, and it is hereby, affirmed.

We have examined the statement of additional facts set out in the supplemental brief filed on behalf of Callahan and Gillum and find no support for a different result from that which we have reached in the case of appellant Maddox. Accordingly, the judgments of the trial court in reference to appellants Callahan and Gillum are likewise due to be, and they are hereby, affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.

Supreme Court, U.S.
FILED
APR 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1592

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD M. MADDOX,

PETITIONER,

v.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA AND
THE COURT OF CRIMINAL APPEALS
OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF
DON SIEGELMAN
ATTORNEY GENERAL,

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

31pp

NO. 86-1592

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1986

RICHARD M. MADDOX,

PETITIONER,

v.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA AND
THE COURT OF CRIMINAL APPEALS
OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OF

DON SIEGELMAN
ATTORNEY GENERAL,

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

QUESTIONS PRESENTED

1. Does a state convict have a right under the United States Constitution to comparative proportionality review of a non-capital sentence?

2. Does a person, who is convicted of trafficking in controlled substances and who is sentenced in accordance with the statute to fifteen (15) years imprisonment, the same being subject to "good time" allowances of two and a half (2.5) times credit for time actually served and also subject to parole after three (3) years service (1.2 years with full good time credit), have any basis for claiming that his sentence is constitutionally disproportionate in light of the sentences subsequently received by his co-defendants pursuant to plea bargains?

THE PARTIES

In the Circuit Court of Coosa County, Alabama, the Court of Criminal Appeals of Alabama, the Supreme Court of Alabama and a former proceeding in this Honorable Court, involving an unrelated issue, the parties were Richard M. Maddox, Vickie Ellen Callahan and Gary Dean Gillum, as Defendants, Appellants and Petitioners, respectively, the said Richard M. Maddox being Petitioner herein, and the State of Alabama, as Plaintiff, Appellee and Respondent, respectively, said State being Respondent herein.

TABLE OF CONTENTS

TABLE OF CONSTITUTIONAL PROVISIONS

TABLE OF CASES

TABLE OF CASES

PAGE

TABLE OF CASES

TABLE OF STATUTES

NO. 86-1592

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1985

RICHARD M. MADDOX,

PETITIONER,

v.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA AND THE
COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF AND ARGUMENT IN OPPOSITION TO THE PETITION

OPINIONS BELOW

The decisions and opinions of the Alabama appellate courts have not as yet been reported, but will be reported as follows:

Maddox, et. al. v. State, _So.2d_ (Ala.Crim.App, June 11, 1985)

A copy of the same is appended to the Petition.

Ex parte Maddox, et al.; In Re: Maddox, et al. v. State, _So.2d_ (Ala, April 25, 1986)

A copy of the same is also appended to the petition.

Maddox v. State, __So.2d__ (Ala.Crim.App, Sept. 9, 1986)

A copy of the same is also appended to the petition.

Ex parte Maddox; In Re: Maddox v. State, __So.2d__(Ala, Jan. 30, 1987)

A copy of the same is also appended to the petition.

The denial of review by this Honorable Court in a former proceeding on an unrelated issue, is reported as follows:

Maddox, et al v. Alabama, __U.S.__, __L.Ed.2d__,107 S. Ct. 404 (1986)

JURISDICTION

The petitioner has invoked this Honorable Court's jurisdiction under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVSISIONS INVOLVED

The Petitioner is raising an alleged claim under the Eighth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

The Petitioner was convicted and sentenced for trafficking in cannabis under Title 20, Section 20-2-80(1)(a), Code of Alabama, 1975, which reads as follows:

> §20-2-80. TRAFFICKING IN CANNABIS, COCAINE, ETC.; MANDATORY MINIMUM TERMS OF IMPRISONMENT.
>
> "Except as authorized in chapter 2, Title 20:

> "(1) Any person who knowingly sells, manufactures, delivers or brings into this state, or who is knowingly in actual or constructive possession of, in excess of one kilo or 2.2. pounds of cannabis is guilty of a felony, which felony shall be known as "trafficking in cannabis." If the quantity of cannabis involved:
>
> "a. Is in excess of one kilo or 2.2 pounts, but less than 2,000 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $25,000.00...."

STATEMENT OF THE CASE

Although the appeals of Vickie E. Callahan and Gary Gillum, originally consolidated with the instant case, were finally diposed of by the Alabama Supreme Court in Ex parte Maddox, et al., (_So.2d_ [Ala. April 25, 1986]; cert. den. __U.S.__ __L.Ed.2d__, 107 S. Ct. 404 [1986]), matters from the records in those cases are relevant to the instant proceedings. Therefore, throughout this brief all record references will be prefaced by the relevant convict's surname.

Petitioner Maddox and one Gary Gillum were indicted by the Grand Jury of Coosa County for trafficking in marijuana[1], and one Vickie Ellen Callahan was indicted for simple possession of marijuana[2] (Maddox, R-503; Gillum, R-24; Callahan, R-24)

---

[1] Section 20-2-80(1)(a), Code of Alabama, 1975; quoted at pages 3-4, above.

[2] Section 20-2-70(a), Code of Alabama, 1975, which reads in pertinent part, as follows:

> §20-2-70. Prohibited acts A.
>
> "(a) Except as authorized by this chapter, any person who possesses...controlled substances enumerated in schedules...I, II, III, IV and V is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two or more than 15 years and, in addition, may be fined not more than $25,000.00. ..."

On November 29, 1982, Maddox went to trial on the indictment and his plea of not guilty and was convicted of trafficking in marijuana as charged in the indictment. (Maddox, R-491). Based on the facts that (1) it was the second time Maddox had been caught in such an operation and (2) Maddox was spending far more than his visible income, the pre-sentence report recommended

> "...[T]hat Maddox receive a more than average Penitentiary [sic] sentence for this offense..." (Maddox R.pp.518-519)

At the sentence hearing held in the Circuit Court on February 18, 1983, Maddox did not contest the pre-sentence report nor offer any evidence or argument, except some letters, which are not part of this record. He was sentenced to fifteen (15) years imprisonment. (Maddox, R-480-486, R-491 and R-493).

Over nine (9) months later, Gillum entered a written plea bargain with the State, under which he agreed to plead guilty to trafficking in marijuana, and the State agreed to recommend a sentence of four (4) years imprisonment. On the same date Callahan entered a similar agreement; she agreed to plead guilty to possession of marijuana, and the State agreed to recommend three (3) years imprisonment. On June 15, 1984, the Court accepted Gillum's and Callahan's guilty pleas and the State's sentence recommendations. (Gillum, R-52-53, 55 & 56; Callahan, R-53-56).

All of these parties appealed to the Court of Criminal Appeals of Alabama claiming illegal search and seizure. Maddox also complained that his sentence was disproportionate in comparison to those of Gillum and Callahan. On June 11, 1985, the Court of Appeals affirmed the convictions and sentences.

(Maddox, et al, v. State, __So.2d__ [Ala.Crim. App, June 11, 1985])

On certiorari, the Supreme Court of Alabama affirmed as to the convictions, but as to Maddox's sentence, ruled and wrote:

> "...Maddox received the maximum[3] sentence allowed by law for his first[4] felony conviction, while Gillum and Callahan received a four-year sentence and a three-year sentence, respectively. The potential excessiveness of Maddox's sentence requires a review pursuant to the Eighth Amendment. Because the Court of Criminal Appeals did not address this issue, we must remand this cause to that Court with directions to consider this cause in

---

[3] The Court apparently thought that Maddox was convicted of possession of marijuana (Section 20-2-70[a], note 2, page 5, above). There is no provision for a maximum sentence for trafficking in cannabis, under Section 20-2-80(1)(a). (Pages 3-4, above).

[4] Maddox had, however, been convicted in 1975 of possession of marijuana incident to a scheme similar to this one. (Maddox, R-519) "... Following an unfavorable pre-sentence report, Maddox was sentenced to fifteen years..." (Maddox v. State, __So.2d__ [Ala.Crim.App, June 11, 1985], Mns. op.p.2, emphasis supplied).

> light of Solem v. Helm, supra. It is so ordered.
>
> "... REMANDED WITH DIRECTIONS.
(Ex parte Maddox, et al, __So.2d.__[Ala, April 25, 1986])

The State applied for rehearing pointing out:

1. Sentences of guilty pleading co-defendants are universally held by the courts to be irrelevant to the propriety of the sentence of one who goes to trial.

2. These is no U.S. Constitutional right to comparative proportionality.

3. In light of applicable "good-time" and parole provisions any suggestion that Maddox's sentence is disproportionate is frivolous.

On June 13, 1986, the Supreme Court denied rehearing without opinion.

On remandment, the State made the same arguments which it had advanced on rehearing in the Alabama Supreme Court. On September 9, 1986, the Court of Criminal Appeals of Alabama affirmed Maddox's sentence. On authority of this Honorable Court's opinions in Rummell v. Estelle (445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 [1980]), Hutto v. Davis (454 U.S. 370, 70 L.Ed.2d 556, 102 S.Ct. 703 [1982]), and Solem v. Helm, note 16, (463 U.S. 277, 290, 77 L.Ed.2d 637, 649, 103 S.Ct. 3001 [1983]), the Court of Appeals declined to engage in an extended proportionality analysis. Contrary to the Petitioner's assertions in the instant proceeding, the Court of Appeals did not suggest that the U.S. Constitution barred state appellate courts from engaging in proportionality review in any case. Rather, the Court held that the Federal Constitution did not mandate such a review in the case of a drug trafficker, who is sentenced to fifteen years imprisonment and who is eligible for "good time" and parole. In addition, on authority of various federal authorities, the Court of Appeals rejected Maddox comparative proportionality claim based on the sentences subsequently received by his plea bargaining co-defendants. (Maddox v. State, __So.2d.__ [Ala.Crim.App, Sept. 9, 1986])

Subsequently, the Court of Appeals rejected Maddox's application for rehearing, and on January 30, 1987, the Alabama Supreme Court denied Maddox's certiorari petition, but declined to approve the Court of Appeals' reasoning. (Ex parte Maddox, __So.2d __[Ala,Jan. 30, 1987])

While the litigation proceeded on remandment to the Court of Criminal Appeals of Alabama, Maddox, Callahan and Gillum petitioned this Honorable Court for review of an unrelated issue. Such review was denied on November 3, 1986. (Maddox, et al. v. Alabama, __U.S.__, __L.F.2d __, 107 S.Ct. 404 [1986]).

STATEMENT OF THE FACTS

The undisputed evidence showed that Maddox was caught "red-handed" operating a large scale marijuana producing operation. (Maddox v. State, __So.2d.__[Ala.Crim.App, June 11, 1985]; Mns.Op. pages 1-5).

ARGUMENT

This is yet another case wherein Solem v. Helm (463 U.S. 277, 77 L.Ed.2d 637, 103 S.Ct. 3001 [1983]) is being cited as authority for a most bizzare theory of constitutional law. Compare Holley v. Smith, No. 86-6408, on the certiorari docket of this Honorable Court. As in Holley, the Petitioner here readily agrees that, objectively speaking, the sentence he received is proportionate. Yet, where, in Holley, it is claimed that Holley's sentence is disproportionate under Solem, because the trial judge had no sentencing discretion, here it is claimed that the sentence is disproportionate, because the trial judge had discretion to sentence persons convicted of trafficking to any term greater than three years imprisonment and excercised that discretion to sentence this Petitioner to fifteen years imprisonment and then, a year later, to sentence the Petitioner's co-defendants to lesser sentences recommended pursuant to plea bargains. It is most difficult to see how Solem stands for either proposition, let alone both.

Obviously, as the Petitioner concedes, a fifteen year sentence is proportionate punishment for operating a large scale marijuana growing operation. Compare Hutto v. Davis, 454 U.S. 370, 70 L.Ed.2d 556, 102 S.Ct. 703 (1982). Such sentence is even more appropriate in this case, since it was the Petitioner's second conviction for a serious violation of the controlled substances laws and in light of the other undisputed matters set out in the pre-sentence report. Although the Petitioner is not eligible for parole until he has served three "calendar years" of his term,[5] he is eligible for "good time". Roberts v. State, 482 So.2d 1293 (Ala.Crim. App, 1985); cert. den. Under Section 14-9-41, Code of Alabama, 1975, the Petitioner could receive credit of 75 days for every 30 days he actually serves.[6] With "good time" the

---

[5] "(a) Notwithstanding the provisions of chapter 22, Title 15, [which provide for probation, parole, etc.] with respect to any person who is found to have violated this article, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this article." (Section 20-2-81, Code of Alabama, 1975)

[6] §14-9-41. COMPUTATION OF INCENTIVE TIME DEDUCTIONS.

"(a) Each prisoner who shall hereafter be convicted of any offense against the laws of the State of Alabama and is confined, in execution of the judgment or sentence upon any conviction, in the penitentiary or at hard labor for the county or in any municipal jail

Petitioner could be eligible for parole after serving less than fifteen (15) months and could serve the entire fifteen year sentence in six (6) years. In light of these considerations, any claim that the Petitioner's sentence is disproportionate would be frivolous. See Rummell v. Estelle, 445 U.S. 263, 63 L.Ed.2d 382, 100 S.Ct. 1133 (1980), cited and discussed with approval in Solem v. Helm, 463 U.S. 277, 300-303, 77 L.Ed.2d 637, 655-657, 103 S.Ct. 3001 (1983). Of course, as already noted, the Petitioner makes no such claim.

---

[6] (Continued) for a definite or indeterminate term, other than for life, whose record of conduct shows that he has faithfully observed the rules for a period of time to be specified by this article may be entitled to earn a deduction from the term of his sentence as follows:

(1) Seventy-five days for each 30 days actually served, while the prisoner is classified as a Class I prisoner...."

The Petitioner raises, first, the issue of whether or not a state appellate court may engage in comparative proportionality reveiw of sentences. This issue can be desposed of quickly: Of course, they may! Alabama appellate courts regularly review death cases for comparative proportionality.[7] The issue here is whether the state appellate courts <u>must</u> provide such review, and the answer to that issue is no! <u>Pulley v. Harris</u>, 465 U.S. 37, 79 L.Ed.2d 29, 104 S.Ct. 871 (1984)

The Petitioner's complaints about his co-defendants' sentences are irrelevant. These persons were sentenced pursuant to plea bargains. Why the District Attorney chose to enter these bargains does not appear on this

---

[7] See, for example, <u>Baldwin v. State</u>, 456 So.2d 117, 128 (Ala.Crim.App, 1983); aff'd sub-nom. <u>Ex parte Baldwin</u>, 456 So.2d 129, 140 (Ala.1984); aff'd sub nom <u>Baldwin v. Alabama</u>, 472 U.S. __, 86 L.Ed.2d 300, 305-306, 105 S.Ct. 2727, 2730 (1985).

record.[8] The practice of sentencing defendants who plead guilty to less punishment than they would otherwise receive is the heart and soul of the universally accepted practice of plea bargaining. It is justified by many considerations, including the savings of judicial and other resources which results from a guilty plea and the fact that one who admits guilt has taken a long step toward rehabilitation and reform. The courts have universally approved of the sentencing of those who plead guilty to less punishment than those who do not. Two examples are sufficient to illustrate the point. In Smith v. Wainwright, (741 F.2d 1248, [11th Cir., 1984); cert. denied, __U.S.__, 85 L.Ed.2d 151, 105 S.Ct. 1883), the Court wrote:

---

[8] The record also does not show whether or not Gillum and Callahan had any prior criminal history.

> "VI. DISPARITY IN SENTENCING
>
> "After the penalty hearing, *the trial judge sentenced Smith to death. Wesley Johnson, in accordance with his plea bargain, received a sentence of only twenty-five years in prison*. Smith contends that this disproportionate punishment violates the Constitution given his "lesser culpability" than Johnson. He requests this court to conduct an independent review of the record and grant relief on this issue, citing as support, *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). *This contention lacks merit*. See generally *Pulley v. Harris*, U.S. , 104 S.Ct. 871, 79 L.Ed.2d 29 (1984); *Collins v. Francis*, 728 F.2d 1322 (11th Cir. 1984); *Moore v. Balkcom*, 716 F.2d 1511 (11th Cir.1983), *cert. denied*, U.S. 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); *Henry v. Wainwright*, 721 F.2d 990 (5th Cir. Unit B 1983), *cert. denied*, ___.U.S. ___, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984)..." (741 F.2d 1248, 1259; emphasis supplied).

Some of the reasons for this are found in the discussion of a similar issue in *Hitchcock v. Wainwright*, (770 F.2d 1514 [11th Cir.,1985]) wherein the Court wrote:

> "...A defendant who pleads guilty...is in a markedly different posture from a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed examination.
>
> "Moreover, by pleading guilty a defendant confers a substantial benefit to the objectives of the criminal justice system:
>
> 'the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.'

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471.

> The heart of a plea bargain, from a defendant's point of view, is the option of avoiding a possibly harsher sentence after conviction at trial.
>
> Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. Blackmon v. Wain-wright, 608 F.2d 183 (5th Cir.1979), cert. denied, 449 U.S. 852, 101 S.Ct. 143, 66 L.Ed.2d 64 (1980)..." (770 F.2d 1514, 1519)

There is, of course, no claim nor basis for a claim of judicial vindictiveness in this case. Gillum and Callahan were sentenced more than a year after the Petitioner, on the basis of plea bargains entered nine months after the Petitioner's sentence. Since an effect cannot precede its cause, Petitioner's sentence could not be based on vindictiveness. The sentences of Gillum and Callahan are simply irrelevant to the Petitioner's sentence.

There is no authority for the proposition that a constitutionally proportionate sentence is rendered disproportionate by sentences received by other defendants under other circumstances.

CONCLUSION

In conclusion, the Respondent, the State of Alabama, respectfully submits that the decision and opinion of the Honorable Court of Criminal Appeals of Alabama are correct and in full accord with the authorities of this Honorable Court and the Constitution of the United States. Therefore, the said Respondent respectfully submits that the writ ought to be denied and prays that it be denied.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY:

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE RESPONDENT

ADDRESS OF COUNSEL:

OFFICE OF THE ATTORNEY GENERAL
ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
(205) 261-7300

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama and one of the Attorneys for the Respondent, do hereby certify that on this _____day of April, 1987, I did serve the requisite number of copies of the foregoing on the attorney for the Petitioner, Richard M. Maddox, by mailing the same to said attorney, first-class postage prepaid and addressed as follows:

Honorable David Cromwell Johnson
Attorney at Law
Suite 900
300 North 21st Street
Birmingham, Alabama 35203

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300